BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICIA L. OLIVER	)	
Claimant	)	
	)	
VS.	)	
	)	
U.S. SAFETY/AXCET	)	
Respondent	)	Docket No. **1,060,613**
	)	
AND	)	
	)	
LUMBERMEN'S UNDERWRITING	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the September 19, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard. Lisa McWilliams, of Kansas City, Missouri, appeared for claimant. J. Scott Gordon, of Overland Park, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the December 18, 2012, preliminary hearing transcript, the September 17, 2013 preliminary hearing transcript, with exhibits, and all pleadings contained in the administrative file.

Claimant alleges repetitive trauma arising out of and in the course of her employment causing injury to her left upper extremity with a date of accident of February 2, 2012. The ALJ found the prevailing factor causing claimant's injury consisted of her work activities for respondent. The ALJ awarded claimant medical treatment.

ISSUES

Respondent requests review of the following: (1) whether claimant's alleged injury/medical condition and need for medical treatment arose out of and in the course of her employment; (2) whether claimant's alleged injury by repetitive trauma arose out of her employment pursuant to K.S.A. 2011 Supp. 44-508(f); and (3) whether claimant's alleged work "accident" or "work activities" were the "prevailing factor" in causing claimant's injury/medical condition and resulting disability or impairment.[1] Respondent requests the ALJ's decision be reversed.

[1] Application for Review by Workers Compensation Board at 2.

Claimant argues she met her burden to prove she sustained personal injury by repetitive trauma arising out of and in the course of her employment with respondent. Claimant maintains she proved her series of repetitive trauma was the prevailing factor causing her injury, medical condition and need for treatment. Claimant urges the Board to affirm the ALJ's Order.

The issues for review are:

1. Did claimant sustain personal injury by repetitive trauma arising out of and in the course of her employment?

2. Were claimant's repetitive work activities the prevailing factor causing claimant's injury, medical condition and need for treatment?

FINDINGS OF FACT

After reviewing the evidentiary record and considering the parties' arguments, the undersigned Board Member finds:

Claimant was age 63 when she testified at the September 17, 2013, preliminary hearing. She commenced employment with respondent on August 27, 1973. Claimant was an optical worker which included taking care of and tracking inventory, computer work, "relieving inventory" and pricing. Claimant described the relieving inventory process:

> Well, I'm keypunching with both hands and I'm lifting trays and stacking them and relieving another tray and stacking them, but I'm keypunching on each tray with both hands.[2]

At the time of her alleged injury, claimant worked 9 hours per day. In addition to keyboarding, claimant engaged in data entry, recalculating orders and pulling frames from boxes. Claimant's keyboarding activities required the use of both hands for approximately 6-6.5 hours per day. Claimant's undisputed testimony established her job for respondent required repetitive use of both upper extremities.

While keypunching for respondent in October 2011, claimant developed left hand pain, along with other symptoms in her left upper extremity, including numbness, tingling and decreased grip strength. Her symptoms thereafter increased and she reported the injury to her supervisor, Gery DeMuth, in February 2012.

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[2] P.H. Trans. (Sep. 17, 2013) at 7.

At respondent's request, claimant was evaluated by Dr. Walter Dean on February 2, 2012. Dr. Dean found claimant had left wrist and hand parathesias and pain. The doctor recommended wrist splinting.

On February 9, 2012, claimant was evaluated by Dr. William Tiemann. Dr. Tiemann diagnosed left carpal tunnel syndrome and opined that claimant's work activities were the prevailing factor in causing the condition.[3] The doctor recommended electrodiagnostic testing, which was performed by Dr. Michael Ryan on February 14, 2012. The EMG revealed severe left median entrapment neuropathy. Claimant and Dr. Tiemann discussed the results of the EMG at a follow-up visit on February 16, 2012. Dr. Tiemann recommended referral to a hand surgeon.

Claimant was seen on February 23, 2012, by Dr. Michael Hall, an orthopedic surgeon, who diagnosed left carpal tunnel syndrome, cervical radiculitis and mild first carpometacarpal arthrosis. Dr. Hall opined the carpal tunnel syndrome was unrelated to claimant's repetitive work duties. Dr. Hall believed claimant had cervical radiculopathy, despite the absence of EMG evidence to support that diagnosis. Claimant was scheduled to undergo a left carpal tunnel release by Dr. Hall, but the procedure was cancelled when respondent declined to authorize the surgery.

Dr. James Stuckmeyer, also an orthopedic surgeon, evaluated claimant on June 4, 2012, at the request of her attorney. The doctor reviewed medical records, took a history and performed a physical examination. Dr. Stuckmeyer opined claimant's left carpal tunnel syndrome was caused by repetitive keyboarding, referred to by Dr. Stuckmeyer as "a repetitive overuse injury."[4] Dr. Stuckmeyer acknowledged that there are a number of potential risk factors for the development of carpal tunnel syndrome, however, he opined only claimant's repetitive work-related trauma was the prevailing factor causing the syndrome. The doctor recommended repeat electrodiagnostic studies and surgical treatment.

At the December 18, 2012, preliminary hearing,[5] the ALJ announced he would appoint Dr. Brian Divelbiss, an orthopedic specialist, to perform a neutral medical evaluation of claimant's left upper extremity and to identify significant factors which may have contributed to claimant's condition. On December 19, 2012, Judge Howard entered a written order appointing Dr. Divelbiss to provide opinions regarding diagnosis and causation. Dr. Divelbiss reviewed claimant's medical records, took a history and performed a physical examination on April 3, 2013. The doctor diagnosed left carpal tunnel syndrome and recommended a left carpal tunnel release.

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[3] *Id.*, Cl. Ex. 2 at 2.

[4] *Id.*, Cl. Ex. 1 at 1.

[5] No evidence was introduced at this hearing.

Regarding causation, Dr. Divelbiss opined as follows:

> While her job activities may be an aggravating factor with her underlying carpal tunnel syndrome, I do not believe that her job activities would be the prevailing cause in the presentation or continuation of her carpal tunnel syndrome. The vast majority of cases of carpal tunnel are "idiopathic" meaning no specific cause can be clearly defined. We have, however, have [sic] been able to define certain factors which are more or less associated with carpal tunnel syndrome. The primary factors associated with the onset of carpal tunnel syndrome are age (particularly over 60), female gender, and family history. All of these factors have a much higher association with the presentation of carpal tunnel syndrome than do any workplace exposures. Despite the common misconception in the lay public, there is no evidence that keyboarding is the prevailing cause of carpal tunnel syndrome.[6]

Dr. Divelbiss observed that a carpal tunnel release "would be more appropriately managed under [claimant's] private insurance..." than under workers compensation.[7] Dr. Divelbiss commented on what he referred to as Dr. Stuckmeyer's "lack of knowledge of the current understanding of carpal tunnel syndrome."[8]

Claimant had a history of right carpal tunnel surgery in 1987, from which she fully recovered. She did not pursue a workers compensation claim for the right carpal tunnel syndrome. Claimant denied any previous symptoms in her left hand, wrist or arm.

With the assistance of wrist splints, claimant remains employed by respondent performing regular duty, but her left carpal tunnel symptoms have worsened over time. To claimant's knowledge, no one else in her family has been diagnosed with carpal tunnel syndrome.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(a), (b) and (c) provide:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
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> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising

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[6] P.H. Trans. (Sep. 17, 2013), Joint Ex. 1 at 2.

[7] *Id.* at 3.

[8] *Id.* at 2.

out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides in relevant part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(I) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

(B) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

(C) The words, “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

(g) “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more

probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

The undersigned Board Member finds no error in Judge Howard's preliminary hearing Order and accordingly affirms the decision in all respects.

In his narrative report, Dr. Stuckmeyer explained the most common cause of carpal tunnel syndrome is tenosynovitis of the flexor tendons. There are nine tendons in and around the carpal canal, through which the median nerve passes at the wrist. Trauma to the flexor tendons can cause inflammation and resulting impingement of the median nerve. Dr. Stuckmeyer opined that within reasonable medical certainty, the direct, proximate and prevailing factor causing claimant's carpal tunnel syndrome was the repetitive keyboarding claimant was required to perform. Neither Drs. Hall nor Divelbiss provide any reasonable explanation demonstrating how the reasoning of Dr. Stuckmeyer is flawed.

This Board Member is not persuaded by the causation opinions of Drs. Divelbiss and Hall for reasons that include the following:

1. Dr. Hall opined that carpal tunnel syndrome is "caused 20-30% of the time with age, especially as a woman gets older."[9] Although that notion may bear on claimant's development of left carpal tunnel in her early 60s, it provides no apparent support for her contraction of right carpal tunnel in her 30s. Dr. Hall's report provided no rationale on which his causation opinion was based, either in terms of specific data from Dr. Hall's professional experience or from some legitimate empirical research. The same is true for Dr. Hall's assertions that if claimant's carpal tunnel syndrome occurred on the job," it require[d] gripping greater than 10 pounds with the wrist in awkward positions for an extended period of time or the use of vibration tools..." and that carpal tunnel syndrome "is not caused by secretarial work."[10] Dr. Hall cited no explicit data from his clinical experience or the results of any scientific studies that support those assertions.

2. Dr. Hall found claimant had cervical radiculopathy, however, the other two physicians whose reports were admitted into evidence do not diagnose that condition. The EMG testing is inconsistent with cervical radiculopathy.

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[9] P.H. Trans., Resp. Ex. A at 2.

[10] *Id*.

3. Dr. Divelbiss concluded the vast majority of cases of carpal tunnel syndrome are "idiopathic," meaning no specific cause can be clearly defined.[11] However, the doctor then evidently changed his mind by emphasizing the role played by claimant's gender, age and family history, which, according to the doctor, have a much higher association with the presentation of carpal tunnel syndrome than do any workplace exposures. Dr. Divelbiss states there is no evidence that keyboarding is the prevailing cause of carpal tunnel syndrome but provides no supporting reference to any scientific studies. Nor does he specify what data, if any, from his professional experience supports his assertions. The causation opinions of Dr. Divelbiss are unreasonable and, as with Dr. Hall's conclusions, are lacking in any significant foundation establishing their reliability.

4. Family history as a risk factor takes on lesser significance when considered in the light of claimant's undisputed testimony that to her knowledge, no one in her family has ever been diagnosed with carpal tunnel syndrome.

5. The only study discussed by any physician in this record is the so-called Mayo Clinic Study to which Dr. Stuckmeyer referred. Although this research, according to Dr. Stuckmeyer, casts doubt on the causal connection between the use of computers and the development of carpal tunnel syndrome, the study itself is not contained in the record. Dr. Stuckmeyer, moreover, provided an undisputed opinion that "the authors of the Mayo Clinic study feel that although their study is an important first step in studying carpal tunnel syndrome and its relationship to the office environment, they really need to see further research conducted on the topic to definitively rule out computer use as a cause of carpal tunnel syndrome."[12]

6. Dr. Stuckmeyer states he has performed over 1,000 carpal tunnel releases in his career and his experience reveals he has seen "innumerable people" like claimant who developed carpal tunnel syndrome as a result of repetitive keyboarding.[13]

7. The comment of Dr. Divelbiss that Dr. Stuckmeyer has a lack of knowledge of the current understanding of carpal tunnel syndrome, is gratuitous and without basis. The same is true of Dr. Divelbiss' declaration that claimant's need for a left carpal tunnel release should be handled under claimant's private insurance, which is not an expression of the doctor's medical judgement, but is rather a legal opinion that the doctor is not qualified to address.

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[11] "Doctors use the term idiopathic to refer to something for which the cause is unknown." *Kuxhausen v. Tillman Partners, L.P.*, 40 Kan. App. 2d 930, 935, 197 P.3d 859 (2008) *aff'd*, 291 Kan. 314, 241 P.3d 75 (2010).

[12] P.H. Trans. (Sept. 17, 2013), Cl's Ex. 1 at 1.

[13] *Id.*, Cl's Ex. 2 at 4.

8. As is apparent from the July 21, 2012, report of Dr. Stuckmeyer, he reviewed records of Dr. Tiemann of OHS-CompCare, a physician authorized by respondent. Dr. Tiemann opined claimant's work activities were the prevailing factor in causing claimant's left carpal tunnel syndrome.[14]

CONCLUSION

1. Claimant sustained personal injury by repetitive trauma arising out of and in the course of her employment.

2. Claimant's repetitive work activities were the prevailing factor causing claimant's left carpal tunnel syndrome and current need for medical treatment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[16]

WHEREFORE, the undersigned Board Member finds that the September 19, 2013, preliminary hearing Order entered by ALJ Steven Howard is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

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HONORABLE GARY R. TERRILL
BOARD MEMBER

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Honorable Steve Howard, ALJ

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[14] *Id.* at 2.

[15] K.S.A. 2011 Supp. 44-534a.

[16] K.S.A. 2011 Supp. 44-555c(k).